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RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

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Attorney for Objectors

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KEVIN EMERY, an individual, on behalf of himself, the general public and those similarly situated) Case No.: CV-09-1808 (JW)
)
)
Plaintiff,) MOTION TO INTERVENE AND
) OBJECTIONS TO CLASS ACTION
) SETTLEMENT
v.)
)
ACER AMERICA CORPORATION; AND DOES 1 THROUGH 50) Trial Judge: Honorable James Ware
)
Defendants.)

Class members Enzo R. Cannata and Mia G. Cannata ("Objectors") are members of the class by virtue of their respective ownership of Acer AS 1410 computers, serial numbers LXSAB0X06693110F942500 and LXSAB0X0739311240D2500. The computers were purchased and the objectors received them as gifts between March 24, 2005 and May 1, 2011. Objectors are minors and hereby object to having any personal information filed in public documents; therefore, any other necessary information should be requested from their attorney.

1 Objectors, by and through the undersigned counsel, hereby submit this Motion to
2 Intervene and respectfully put forward the following objections to the proposed class action
3 settlement, pursuant to the class action Notice:

4 **1. Objection to the Claims Process.**

5 The claims process is overly complicated; especially for minors and adolescents who
6 make up a significant and silent percentage of the class. The complicated claims procedures
7 force class members to first unearth past documents, receipts, statements, checks,
8 correspondence and/or itemized products and services relating to Acer's product defect, then
9 determine whether they are in Group A, B, or C. There is no justification for forcing class
10 members to unearth excessive documentation, when Acer could easily send the proper
11 programs and equipment to class member using their business records or recall the
12 computers to be fixed by an authorized dealer or Acer America. The claims process in this
13 settlement creates an obstacle few class members will find worth the effort especially, given
14 that each claimant must sign a form under penalty of perjury.

15 Further repulsing class members away from this Settlement is requiring some class
16 members, who may be in Group A, to send Acer America an additional \$10.00 in order to
17 receive certain equipment to rectify Acer's product shortcomings.

18 The proposed claims process improperly places the burden on the class members to
19 make a claim, thus the settlement has very little value to the class; certainly much less than the
20 **\$280,000,000.00 Settlement Value** the parties flaunt in the Notice. The reality is this
21 Settlement's claims process will deter class members from submitting claims and imposes
22 hurdles on potential claimants, thus reducing the actual value of the settlement.

23 **2. The Court Should Wait For The Claims Data Before Awarding Fees.**

24 This Honorable Court should wait to award attorneys' fees and plaintiff's incentive award
25 until such time as it has had a chance to review the claims actually made in order to assure it that

1 the attorneys' fees and awards are reasonably related to the actual benefit received by the Class. This
2 would be in keeping with several cases in other jurisdictions and with the Federal Judicial Center's
3 "Pocket Guide" for managing class action litigation. *"Managing Class Action Litigation: A*
4 *Pocket Guide for Judges, 3rd Ed*, Barabara J. Rothstein & Thomas E. Willging. Federal Judicial
5 Center, 2010 at 16 suggests that the best way to determine appropriate attorneys' fees and
6 awards is to wait until after the claims process is complete and the value of the benefits to the
7 Class can be established by calculating class members' **actual use**.

9 In *Yeagley v. Wells Fargo & Co.*, 2008 U.S. Dist. LEXIS 5040 (N.D. Cal. 2008), the
10 court confronted the task of valuing a settlement for the purposes of awarding attorney's
11 fees and stated that "Common sense dictates that a reasonable fee in a class action
12 settlement is a fee that takes into account the actual results obtained. *Id.* at *20-28.

14 Given the strict eligibility requirements and burdensome claims procedure,
15 identified above, it is likely that class members will be discouraged from filing a claim. If
16 that is the case then this Settlement will have little value and be illusory. In this matter, the
17 Claims Forms are due by March 14, 2012, or 30 days after the Court grants final approval
18 of the settlement, whichever is later. Therefore it is ever more important to wait a bit
19 longer to assess the claims and determine if the settlement value to the class members is
20 fair, adequate and reasonable.

22 **3. "Clear Sailing" Provision is Inappropriate.**

24 "Defendant agrees not to oppose or to submit any evidence or argument challenging or
25 undermining such application for attorneys' fees, costs, expenses, or incentive awards" of
26 \$1,200,000.00 for attorneys' fees and \$15,000.00 for Plaintiff's Award which Class Counsel will
27 seek. Amended Settlement Agreement, Section VI. ¶ 6.1, p. 15. However, this agreement
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1 should not be afforded any weight by this Court, and is clearly not binding on this Court. "[A]ny
2 award of attorney's fees to class counsel must be reasonable in comparison to the benefits
3 conferred on the class through counsel's efforts." *Scardelletti v. DeBarr*, 43 Fed. Appx. 525,
4 528 (4th Cir. 2002) (citations omitted); see also *Brown v. Phillips Petroleum, Co.*, 838 F.2d 451,
5 453 (10th Cir. 1988). Class Counsel has not shown that the requested fee is justified when
6 compared to the benefits conferred on the Class through counsel's efforts; especially given that
7 the claims period has not ended and the claims data has not been reviewed yet.
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9 "[C]lear sailing provisions ... represent *prima facie* evidence of simultaneous
10 negotiations of merit relief and fees, which is a practice fraught with serious ethical concerns
11 for lawyers representing the class. Both courts and commentators have expressed apprehension
12 that a plaintiff's counsel may be accepting a lower settlement for the class in exchange for a
13 generous and non-adversarial treatment of fees." William D. Henderson, *Clear Sailing*
14 *Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul.L.Rev. 813, 815
15 (2003) (advocating *per se* ban on clear sailing clauses). The Fifth Circuit has stated that "a
16 district court is not bound by the agreement of the parties as to the amount of attorneys' fees. In fixing
17 the amount of attorneys' fees the court must, of course, take all [appropriate] criteria into account,
18 including the difficulty of the case and the uncertainty of recovery. [The Court] is not, however,
19 merely to ratify a pre-arranged compact." *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir.
20 1980). Therefore, the Court should disregard the "clear sailing" provision and do its own analysis
21 of the Fee and Award Request.
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25 **4. A Low Number Of Objections Does Not Mean Class Approval.**

26 Somehow Class Counsel wants the Court to infer that there was "overwhelming positive"
27 approval for this Settlement since no objections have been filed. (Gutride Safier Motion for
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1 Final Approval, ¶5.) However given the structure of class actions, the number of objectors will
2 always be small relative to the size of the class.

3 The reality is no class member, especially a minor, has the financial incentive (or even
4 the time, given the short notice period) to organize thousands, and sometimes millions, of class
5 members to oppose an unfair settlement; any individual class member's objection will be
6 relatively meaningless at the margin, meaning that individual class members will prefer to free
7 ride off of those who do object. If this Court interprets that a small number of objections
8 supports settlement approval, this would make any objection meaningless because it does not
9 distinguish between good settlements and bad settlements, each of which have absolutely low
10 numbers of, and often times no, objections. This determination would unfairly prejudice absent
11 class members and would be a mistake to infer class approval from the fact of a small number of
12 objectors.
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15 Almost any given class action settlement, no matter how much it betrays the interest of
16 the class, will produce only a small number of objectors. "Silence may be a function of
17 ignorance about the settlement terms or may reflect an insufficient amount of time to object. But
18 most likely, silence is a rational response to any proposed settlement even if that settlement is
19 inadequate. For individual class members, objecting does not appear to be cost-beneficial.
20 Objecting entails costs, and the stakes for individual class members are often low." Christopher
21 R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*,
22 59 Fla. L. Rev. 71, 73 (2007). It is incorrect to argue that this understandable tendency to ignore
23 notice or free-ride on the work of other objectors is best understood as acquiescence in or
24 evidence of support for the settlement. Silence is simply not consent. *Grove v. Principal Mut.*
25 *Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001) (citing *GM Pick-Up*, 55 F.3d at 789).
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1 Acquiescence to a bad deal is something quite different than affirmative support.” *In re General*
2 *Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1137 (7th Cir. 1979).

3 There is usually little hope that opt-outs can recover for their claims – the entire purpose
4 of Rule 23 class actions is to aggregate claims that would be uneconomical to bring individually.
5 “Almost by definition, most class members have too little at stake to warrant opting out of the
6 class litigation and filing an individual lawsuit. Thus, opting out is probably not a viable option
7 even though a proposed settlement is unfair or inadequate.” Leslie, 59 Fla. L. Rev. at 109. “[A]
8 combination of observations about the practical realities of class actions has led a number of
9 courts to be considerably more cautious about inferring support from a small number of objectors
10 to a sophisticated settlement.” *GM Pick-Up*, 55 F.3d at 812 (citing *In re Corrugated Container*
11 *Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981)); *Petruzzi’s, Inc. v. Darling-Delaware Co.*,
12 880 F. Supp. 292, 297 (M.D. Pa. 1995). “[A] low number of objectors is almost guaranteed by
13 an optout regime, especially one in which the putative class members receive notice of the action
14 and notice of the settlement offer simultaneously.” *Ellis v. Edward D. Jones & Co.*, 527 F. Supp.
15 2d 439, 446 (W.D. Pa. 2007). “[W]here notice of the class action is, again as in this case, sent
16 simultaneously with the notice of the settlement itself, the class members are presented with
17 what looks like a *fait accompli*.” *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust*
18 *Co.*, 834 F.2d 677, 680-681 (7th Cir. 1987) (Posner, J.).

19 As such, the response from class members cannot be seen as something akin to an
20 election or a public opinion poll. See *GM Pick-Up*, 55 at 813 (finding that “class reaction factor”
21 does not weigh in favor of approval, even when there is low number of objectors in large class,
22 when “those who did object did so quite vociferously”); Theodore Eisenberg & Geoffrey Miller,
23 *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical*
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Issues, 57 Vand. L. Rev. 1529, 1532 (2004). A court must act as a guardian for all class members – whether or not they have formally entered the case by registering an objection. “[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility.” *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971).

Thus, in a low-dollar case like this where no class member has economic incentive to object, the presence of any substantive good-faith objections is a noteworthy event. The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors. *GM Pick-Up*, 55 F.3d at 812-13; *ALI Principles* § 3.05, *comment a.* at 206.

5. Objectors Provide Value To The Settlement.

Objectors play an important role in assuring that settlements and attorneys’ fees and awards are reasonable and fair, which is why their existence is assured and guaranteed under Rule 23(e)(5). Several cases have discussed why objectors are necessary to the class settlement process, including *Vollmer v. Selden*, 350 F.3d 656 (7th Cir. 2003):

Class counsel, for instance, might settle claims for significantly less than they are worth, not because they think it is in the class’s best interest, but instead because they are satisfied with the fees they will take away. [Citation]. Interveners counteract any inherent objectionable tendencies by reintroducing an adversarial relationship into the settlement process and thereby improving the chances that a claim will be settled for its fair value.... The slighness of individual recovery does not make the counsel’s purpose invalid nor his role as objector less vital.

350 F.3d at 660 (emphasis added).

Independent information provided by Objector’s counsel complements the Court’s fiduciary role in protecting the class members, rather than detracting from it, and prevents a rubber stamp of a settlement which may not have resolved the issues in favor of class members.

1 6. Objectors respectfully adopt and incorporate into these Objections all other well-
2 taken, timely filed Objections that are not inconsistent with these Objections. Objectors also
3 reserve the right to supplement these Objections with other and fuller objections.

4 7. Objectors do not plan to attend the fairness hearing, but rather will rely on their
5 written Objections.

6 8. The Class Members have a legally protectable interest in this litigation. That
7 interest will be impacted by the proposed settlement agreement, and the legal fees and awards that
8 are proposed to be paid.

9 9. These Objections, presented to the Court as a matter of right, are properly and timely
10 filed by the Objectors. All of the legally required prerequisites material to these objections have
11 been met.

12 For the foregoing reasons, Objectors, by and through their Counsel, prays that this
13 Honorable Court:
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- 15 A. Grant its Motion to Intervene;
16 B. Sustain these Objections in full;
17 C. Deny approval of the settlement, for the reasons stated herein;
18 D. Continue the issue of attorneys' fees and awards for a subsequent hearing after the
19 claims period ends, the claims data has been reviewed and the actual value of the settlement has
20 been assessed.

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22 Respectfully submitted,

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25 Sam P. Cannata

26 Attorney for the Objectors
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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2012, I delivered the foregoing document to be filed by Federal Express to the Clerk of Court, United District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, CA 94102.

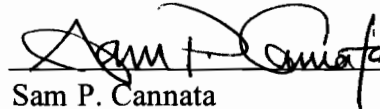
I further certify that I mailed the foregoing document by First Class Mail, postage prepaid, to the following participants at the mailing addresses listed:

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